Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

BERTON SIEGEL,

Petitioner-Appellant,

v.

JAMES MCFADDEN, Warden; et al.,

Respondents-Appellees.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether Siegel Was Denied His Right To Counsel Because Any Sentence That May Result In The Actual Deprivation Of A Person's Liberty May Not Be Imposed Unless The Defendant Was Accorded The 'Guiding Hand Of Counsel' In The Prosecution For The Crimes Charged.[1]

[1] All exhibits referenced were attached to the filing with the District Court of Arizona.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Berton Siegel (hereinafter "Petitioner" or "Siegel") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the order of the United States Court of Appeals for the Ninth Circuit denying Siegel's request for a certificate of appealability is annexed as Appendix A. A copy of the Judgment and Order of the United States District Court for the District of Arizona is annexed as Appendix B.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit filed its order denying Petitioner's request for a certificate of appealability was September 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Sixth amendment to the United States Constitution

b) 28 U.S.C. §1254(1)

c) 28 U.S.C. §2254

STATEMENT OF THE CASE

On or about July 1989, Dr. Berton Siegel and his co-defendants were indicted on seventeen offenses. All of which occurred between October 1982 and July 1984. *See* Exhibit A, Indictment.

At the time of Petitioner's arraignment, he was having extreme difficulty obtaining adequate employment and was in financial turmoil. *See* Exhibit B, Financial Statement dated 8/9/89. During this time, Petitioner was attempting to secure private counsel. *See* Exhibit C, Transcript of 1/28/92, p. 159. Petitioner contacted numerous private practitioners, but was quoted fees ranging from $100,000.00 to $250,000.00, which were required to be paid in advance. *Id.*

Based on the above financial information, on or about August 28, 1989, Maricopa County Superior Court Judge Gregory Martin ruled that Petitioner was indigent and appointed Patrick McGillicuddy, Esq. as counsel of record, and Petitioner was ordered to make payments of $2,000.00 per month to the Clerk of the Superior Court effective September 19, 1989, and due on the 19th day of each month thereafter while counsel was appointed. *See* Exhibit D, Minute Entry of 8/28/89.

On September 19, 1990, court-appointed counsel requested that the Court review the Conditions of Contribution on the grounds that paying $2,000.00 per month for court-appointed counsel became a financial burden on Petitioner. *See* Exhibit E, Motion to Review Contributions dated September 19, 1990. On October 1, 1990, Superior Court Judge Rebecca Albrecht determined that Petitioner failed to set forth any basis that suggested there had been a change in his financial circumstances that would require

such a review. *See* Exhibit F, Minute Entry of 10/1/90. The court, therefore, declined to set the matter for hearing, and Petitioner was required to continue making monthly payments. *See Id.*

The State then filed a motion to review the determination of indigency, and a hearing on the motion was held on October 24, 1990. *See* Exhibit G, State's Motion to Reconsider Indigency. At that hearing, the court heard from two private lawyers familiar with the nature of the charges then pending against the Petitioner and his financial situation. *See* Exhibit H, Reporter's Transcript of 10/24/90. One attorney described the charges as "very sophisticated" and testified that any attorney would need no less than 1,000 hours of pre-trial preparation to properly represent Petitioner in this case for a trial that would last approximately two (2) months. *Id.*, pp. 7-8, 24. The other attorney witness, Mr. Wieser, testified that other creditors were likely to be able to attack the homestead exemption. The attorney testified he knew of no significant assets that could be converted to cash, and that Petitioner had approximately $250,000.00 in federal tax liens and that Petitioner's financial situation was worse than when the court made its first finding of indigency. *Id.*, pp. 31-36, 53-55.

In August 1989, Petitioner lost his employment, was involved in a second bankruptcy and was unable to secure representation in that proceeding. *Id.*, p. 36-42. At the conclusion of the hearing, the court held that Petitioner was unable through his current financial resources to retain competent counsel to represent him in these proceedings. The court ordered Petitioner to continue monthly payments toward the cost of court-appointed counsel. *Id.*, p. 44-5. *See* Exhibit I, Minute Entry of 10/24/90, p. 2.

In January 1992, the State moved the court for another hearing to determine if Petitioner was still indigent. *See* Exhibit J, State's Motion for Redetermination of Indigency dated December 12, 1991. The state's position was that the bankruptcy matters were settled and Petitioner's financial condition had bettered since the last determination of indigency in October 1990. *Id.* In its motion for another hearing, the State acknowledged Petitioner was $37,000.00 behind on court ordered contributions to court appointed counsel. *Id.*

At the January 28, 1992 hearing, the State argued Petitioner had a home in Paradise Valley that had just been sold and was scheduled to close on February 15, 1992. *See* Exhibit C, p. 40, 107. When the property closed, Petitioner would receive his homestead exemption of approximately $50,000. *Id.* The State did acknowledge that after paying bankruptcy counsel, Petitioner would be left with only $34,000.00 to apply to a retainer for private counsel. *Id.*, pp. 40, 107-8, 136. The State also avowed to the Court that they believed Petitioner owned an airplane although they had no evidence of it, and the State introduced employment documents from two years prior to the hearing. *Id.*, p. 40-1, 98-100, 108-110.

Court-appointed counsel argued the State should be required to bring in current financial figures if it wished to remove Petitioner's counsel. *See* Exhibit C, p. 43, Exhibit B. The State then argued Petitioner had a tax-free disability insurance policy from which he was receiving approximately $9,990 per month. *Id.*, pp. 43, 128-9. This disability policy was disclosed to Judge Martin, who originally declared Petitioner indigent and to Judge Albrecht, who denied the State's second attempt to strip Petitioner of counsel. *See* Exhibit H, p. 41, Exhibit C. Mr.

Aisner admitted he did not investigate the terms and conditions of the disability contract, and was unaware the disability payments would end in six years when Petitioner turned 65 years old. *See* Exhibit C, p. 128-9, Exhibit B. Court-appointed counsel argued that "although Dr. Siegel may have had a larger than average income compared to the typical indigent, the nature and complexity of the charges, together with the lack of accumulated funds to pay an entire retainer 'up front', effectively precludes Dr. Siegel from retaining private counsel in this matter." *See* Exhibit L, Defendant's Response to Motion to Redetermine Indigency 12/27/91, p. 3. At the conclusion of the hearing, Judge Howe stripped Petitioner of the assistance of court appointed counsel that very day. *See* Exhibit C, p. 167.

The discovery in this case was voluminous. *See* Exhibit M, Affidavit of Dana Carpenter. An entire room at the Arizona Attorney General's office was filled from floor to ceiling with discovery. *Id.* In fact, the court-appointed counsel avowed to the court that the legal and factual issues in this matter were some of the most complex counsel had dealt with in twelve years of practice. *See* Exhibit L, p. 2. The case was so complex that court-appointed counsel secured the services of numerous experts, including an investigator, an accounting expert, an AHCCCS expert, a reinsurance expert, a business expert, and a capitation expert to assist in preparing the defense. In addition, the defense had two full-time paralegals working for two and a half years on the case. A total of 80,000 documents had been reviewed. *Id.*

Dr. Siegel had no assets to pledge as a retainer to private counsel because all of his assets were tied up in bankruptcy. On March 24, 1992, while representing

himself, Petitioner called the court requesting legal advice. *See* Exhibit N, Minute Entry of 3/25/92. The court did not provide advice, and Petitioner continued to represent himself. There is *no* record of the court advising Petitioner of the dangers of proceeding *pro se* or the advisability of seeking counsel. Petitioner represented himself through the remainder of the proceedings.

On July 1, 1992, Petitioner, appearing without counsel, pled guilty to three (3) counts of Facilitation of Theft, a class six undesignated, nondangerous and nonrepetitive offense in violation of A.R.S. §§13-1004 and 1802(A)(12). *See* Exhibit O, Change of Plea Minute Entry. On July 31, 1992, the court designated one of the counts a class 6 felony, left the remaining counts undesignated, suspended the imposition of a sentence and imposed a three (3) year term of probation on all counts to run concurrently. *See* Exhibit P, Sentencing Minute Entry of 7/31/92. As additional terms and conditions of probation, Petitioner was ordered to pay: (1) a probation service fee at a rate of $30.00 per month; (2) felony assessment in the amount of $308.00; (3) restitution to the victim of the crime, Lowell Rothschild – HCPA Bankruptcy Trustee, in the total amount of $8,619.40 payable in regular monthly payments of $100.00; (4) reimbursement to the Arizona Attorney General's office for the cost of prosecution in the total amount of $50,000.00 payable in regular monthly payments of $1,400.00; (5) reimbursement to Maricopa County for attorney fees per Judge Martin's order in the total amount of $50,000.00, payable in monthly payments of $500.00; and (6) a fine in the amount of $14,000.00 due on or before November 1, 1992. Most importantly, the plea agreement (which was entered into without the assistance of counsel) resulted in a felony conviction which, in turn,

resulted in the loss of his license to practice medicine. *See* Exhibit Q, Order of Medical Board.

On January 14, 1993, Petitioner appearing on his own behalf before Judge Howe requested the Court appoint counsel to assist Petitioner on an appeal and relief from conditions of probation. *See* Exhibit R, See Minute Entry of 1/14/93. Judge Howe denied both requests and ordered Petitioner to "catch up" on the overdue payments to the Court or the Adult Probation Office would file a Petition to Revoke Probation. *Id.*, p. 2.

On October 1, 1987, Petitioner filed a bankruptcy in the United States Bankruptcy Court, District of Arizona. On July 15, 1993, amended schedules were filed, listing the monetary obligations of the probation and were served upon the County and the Office of the Attorney General. On March 10, 1994, the Petitioner obtained a discharge of his debts. After May 20, 1993, Petitioner made no further payments as required by the probation conditions because Petitioner believed those payments had been discharged in the bankruptcy proceeding. *See* Exhibit V, Bankruptcy Discharge.

On January 14, 1994, the probation officer notified the sentencing judge that Petitioner failed to pay certain items required under his probation and the probation fees because Petitioner believed he was under no obligation to pay since he had listed these financial obligations on his Chapter 11 Bankruptcy case. *See* Exhibit Y, Court of Appeals Memorandum decision; *See* Exhibit X, Transcript of 3/15/94, p. 25. The sentencing judge directed the probation officer to file a Petition to Revoke. *See* Exhibit Y.

A Petition to Revoke Probation was subsequently filed alleging that Petitioner had violated certain terms of

probation. *See* Exhibit W, Petition to revoke probation. The Petitioner denied the allegations and a probation revocation hearing was conducted before the Honorable Rae L. Chornenky on March 15, 1994, and the Petitioner was held in violation of his probation. *See* Exhibit X.

On April 27, 1994, a disposition hearing was held, and the court revoked Petitioner's probation on Count 12 and sentenced Petitioner to the Department of Corrections for the presumptive term of 1.5 years. On the other two counts, the court reinstated probation and added a requirement that Petitioner perform 1,000 hours of community service. *See* Exhibit K, Minute Entry of 4/27/94.

Petitioner timely filed a Notice of Appeal. *See* Exhibit Z, Court of Appeals Decision. In his appeal, Petitioner argued that the trial court erred in revoking Petitioner's probation for failure to satisfy his fine and reimbursement obligations. *Id.* The Arizona Court of Appeals granted relief, finding that the trial court abused its discretion in revoking Petitioner's probation. The Court of Appeals held that, once the state court made an informal finding of non-dischargeability of this debt and Petitioner expressed a willingness to pay the debt, the court abused its discretion in sending Petitioner to prison without giving him an opportunity to satisfy the debt. The order to revoke probation was vacated. *Id.*

Petitioner filed a Petition for Postconviction Relief alleging that Petitioner's right to counsel was violated when the court denied Petitioner's indigent status and relieved his court appointed attorney from Petitioner's case. *See* Exhibit AA, Petition for Postconviction Relief. The trial court denied Petitioner's post-conviction relief, as did the Arizona Court of Appeals and the Arizona Supreme

Court. *See* Exhibit BB, CC and DD, Trial Court's denial of Postconviction Relief, Court of Appeals' denial of Postconviction Relief, and Supreme Court denial of Postconviction Relief.

While Petitioner was incarcerated, the Board of Medical Examiners took action to revoke his medical license. *See* Exhibit EE, Applications for Reinstatement of Medical License. Although counsel represented him, Petitioner was unable to adequately defend himself given his incarceration. Petitioner was compelled to enter an agreement whereby his license was suspended for two years after which time he could regain his license upon passing competency examinations. In the last several years, Petitioner has applied to the Board of Medical Examiners for reinstatement of his medical license. Petitioner's applications have regularly been denied. *Id.*

On December 13, 2000, Petitioner filed a Petition for Writ of Habeas Corpus or in the Alternative Error Coram Nobis, in the Federal District Court Case No. CV00-2360 PHX-JAT-LOA (hereinafter the "Petition"). Regarding, the habeas corpus petition, the District Court stated that the federal courts do not have authority under 28 U.S.C. §2254 to entertain habeas corpus petitions because Petitioner was no longer in state custody under his state conviction. On April 3, 2001, Petitioner filed a "Motion for Reconsideration of Judgment Dismissing Amended Petition for a Writ of Habeas Corpus/or in the Alternative Error Coram Nobis". *See Motion for Reconsideration*, p. 2. On November 11, 2001, the District Court issued an Order in which it declined to rethink the jurisdictional question and adopt the doctrine of "hypothetical jurisdiction" in this case.

Petitioner then requested a Certificate of Appealability from the Court of Appeals of the Ninth Circuit, but was denied that request. Recently, the Supreme Court has handed down a decision, which requires the trial court to reverse a conviction based on the denial of counsel in the proceeding. *See Alabama v. Shelton*, 535 U.S. 654, 122 S. Ct. 1764 (May 20, 2002).

On December 3, 2002, Petitioner filed a Notice of Post-Conviction relief, and on January 27, 2003 filed a Petition for Post-Conviction Relief, Amended Petition for Post-Conviction Relief and Exhibits. On March 7, 2003, the State filed State's Response to Petition for Post Conviction Relief. On March 31, 2003, the Petitioner filed his Reply in Support of Petition for Post-Conviction Relief. On April 8, 2003, the trial court filed its order dismissing Petitioner's Petition for Post-Conviction Relief. On April 18, 2003, Petitioner filed a Notice of Appeal to the Arizona Court of Appeals, which was denied.

Petitioner then filed a second Petition for Writ of Habeas Corpus based upon the new law and decision set forth by this Court in *Alabama v. Shelton*, which was denied by the District Court of Arizona on November 10, 2005. Petitioner's request for a certificate of appealability was then denied by the Ninth Circuit Court of Appeals on September 28, 2006. This Petition for Writ of Certiorari then followed.

REASON FOR GRANTING THE WRIT

Siegel contends that the District Court's denial of his Petition for Writ of Habeas Corpus was error because there has been a "significant change in the law" applicable

to Petitioner's case entitling Petitioner to the habeas relief requested. In Petitioner's case, Petitioner was sentenced and later sent to prison without the "guiding hand of counsel". This resulted in Petitioner being denied his Sixth Amendment rights at a critical juncture when his liberty was threatened. In light of the United States Supreme Court's ruling in *Alabama v. Shelton*, Petitioner's plea agreement must be vacated and his sentence set aside.

I. Standard Of Review.

The District Court of Arizona denied Petitioner's Petition for Writ of Habeas Corpus. The district court's denial of habeas relief is reviewed de novo. *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000).

II. Any Sentence That May Result In The Actual Deprivation Of A Person's Liberty May Not Be Imposed Unless The Defendant Was Accorded The 'Guiding Hand Of Counsel' In The Prosecution For The Crimes Charged.

There has been a "significant change in the law" applicable to Petitioner's case entitling Petitioner to the post conviction relief requested. The essential facts and legal reasoning in *Alabama v. Shelton*, 122 S.Ct. 1764 (2002) are very similar and apply to Petitioner's case.

In *Alabama v. Shelton*, 122 S.Ct. 1764 (2002), Shelton was convicted of third-degree assault, a misdemeanor carrying a maximum of one year in jail and a $2,000 fine. After representing himself at a bench trial in the Alabama state court and being found guilty, the defendant invoked his right to a new trial before a jury where he again appeared without a lawyer and was again found guilty.

The trial court *continuously* warned the defendant about the problems of self-representation, *but at no time offered assistance of counsel at the state's expense. Id.*, 122 S.Ct. at 1767-8. The Alabama court sentenced the defendant to 30 days in the county jail, then suspended the sentence and placed him on two years unsupervised probation. *Id.*, at 1768.

The issue in the case was whether the Sixth Amendment right to appointed counsel applies to any situation that may "end up in the actual deprivation of a person's liberty". *Id.* The state court sentenced the defendant to 30 days in the county prison, and the court suspended the sentence and placed the defendant on two years unsupervised probation. *Id.*, p. 1768. The defendant appealed his conviction, and the Alabama Court of Appeals affirmed. *Id.* The Supreme Court of Alabama reversed in relevant part. The court affirmed the conviction, but reversed the suspended sentence and vacated the two-year probation based on the defendant not receiving assistance of counsel. *Id.*

The Supreme Court accepted certiorari to resolve the conflict among the courts as to whether the Sixth Amendment's appointment of counsel, as delineated in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois,* 440 U.S. 367 (1979), requires "actual imprisonment" as "a constitutional prerequisite to imposition of a conditional or suspended sentence." 122 S. Ct. at 1768. In the *Shelton* decision, authored by Justice Ginsberg, the Court held that a suspended sentence may not be imposed unless the defendant was accorded the "*guiding hand of counsel in the prosecution for the crime charged.*" *Id.* at 1767. (Emphasis added.) The Court stated that suspended sentences are "prison term[s] imposed for the offense of conviction," and when "the prison term is triggered, the

defendant is incarcerated not for the probation violation, but for the underlying offense." Thus, the uncounseled conviction results in "the actual deprivation of a person's liberty," which is "*precisely what the Sixth Amendment does not allow.*" *Id.* at 1770 (Emphasis added). Therefore, the "actual imprisonment" standard is not a constitutional prerequisite anymore to the requirement of counsel. 122 S. Ct. at 1768. *See also C.M. v. State*, 2002 Ala. Crim. App. LEXIS 239 (Ala. Crim. App. Nov. 22, 2002) (Pursuant to *Shelton*, by denying the defendant counsel during the guilt phase of proceedings, the juvenile court foreclosed its option of later placing the defendant in a youth detention facility.)

Most circuits and high state courts have not provided extensive rulings on the *Alabama v. Shelton* case yet, but have instead reversed and remanded cases where *Shelton* is applicable for application of the case by the lower courts. *See Torres-Soria v. United States*, 2002 U.S. LEXIS 8668, 71 U.S.L.W. 3387 (U.S. Dec. 2, 2002); *United States v. Black*, 37 Fed. Appx. 654, 2002 U.S. App. LEXIS 12123 (2002); *Barnes v. State*, 275 Ga. 499, 570 S.E.2d 277 (Ga. Sup. Ct. 2002).

Petitioner's sentence is required to be reversed because the facts in Petitioner's case are *much more egregious* than in Shelton's case. In Petitioner's case, he appeared *without counsel and pled guilty to three open ended offenses.* The Court *never* warned Petitioner about the danger of appearing without an attorney, and *never* offered the services of counsel. In Petitioner's case the Court even went further in the violation of Petitioner's Sixth Amendment rights: When Petitioner's financial condition deteriorated past his previously determined indigency status, the Judge ordered the withdrawal of

court-appointed counsel, and at sentencing, the Court designated one of Petitioner's undesignated offenses a felony.

The suspension of the imposition of Petitioner's sentence was clearly a situation which may have ended "up in the actual deprivation of a person's liberty." *Shelton*, 122 S. Ct. 1767. *In Petitioner's case, this actually happened.* Petitioner's probation was revoked, and he was sent to prison. Petitioner was *sentenced* and *sent to prison* without legal representation, which is clearly unlawful pursuant to the *Shelton* case.

Applying the law in *Alabama* to Petitioner's case, Petitioner's suspended sentence and the later prison term should not have been imposed unless he was accorded "*the guiding hand of counsel in the prosecution for the crime charged.*" *Id.* at 1767. Petitioner became a convicted felon and went to prison due to the denial of his Sixth Amendment rights. Based upon the above, Petitioner's Petition for Post-Conviction Relief must be granted.

The last important issue applicable to Petitioner's case, as determined by the Supreme Court in *Shelton*, is that such cases *may be reviewed after a person's probation or suspended sentence has expired* which is the situation in Petitioner's case. *Alabama v. Shelton*, 122 S.Ct. 1764 (May 20, 2002). *Alabama v. Shelton* was decided by the Supreme Court *well after Shelton's two year probation period expired.* In Shelton's case, he received the same relief Petitioner is requesting under identical circumstances.

CONCLUSION

In Petitioner's case, Petitioner was sentenced and later sent to prison without the "guiding hand of counsel". This resulted in Petitioner being denied his Sixth Amendment rights at a critical juncture when his liberty was threatened. In light of the United States Supreme Court's ruling in *Alabama v. Shelton*, Petitioner's plea agreement must be vacated and his sentence set aside.

RESPECTFULLY SUBMITTED this 26th day of December, 2006.

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Berton Siegel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERTON SIEGEL, Petitioner-Appellant, v. JAMES MCFADDEN, Warden; et al., Respondents-Appellees.	No. 06-16302 D.C. No. CV-05-00988-PHX-JAT District of Arizona, Phoenix ORDER

(Filed Sep. 28, 2006)

Before: REINHARDT and O'SCANNLAIN, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Berton Siegel, Petitioner, vs. James McFadden; et al., Respondents.	No. CV-05-988-PHX-JAT **ORDER**

Pending before the Court is the Report and Recommendation (Doc. #14) issued by the Magistrate Judge recommending that the Petition in this case be dismissed for lack of jurisdiction because the Petitioner was not in custody at the time the Petition was filed. No objections to the Report and Recommendation were filed.

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that the district judge must review the magistrate judge's findings and recommendations *de novo if objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219, 1126 (D. Ariz. 2003) ("Following *Reyna-Tapia*, this Court concludes that *de novo* review of factual and legal issues is required if objections are made, 'but not otherwise.'"). District courts are not required to conduct "any review at all . . . *of any issue* that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) ("the court shall

make a *de novo* determination of those portions of the [report and recommendation] to which objection is made.").

No objections having been filed,

IT IS ORDERED that the Report and Recommendation (Doc. #14) is accepted and adopted, the Petition in this case is dismissed for lack of jurisdiction and the Clerk of the Court shall enter judgment accordingly.

DATED this 10th day of November, 2005.

/s/ James A. Teilborg
James A. Teilborg
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Berton Siegel, Petitioner, v. James McFadden; et al., Respondents.	**JUDGMENT IN A CIVIL CASE** CV-05-988-PHX-JAT

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus and this action are dismissed for lack of jurisdiction. Judgment is entered in favor of respondents and against petitioner.

November 10, 2005
Date

/s/ RICHARD H. WEARE
District Court
Executive/Clerk

/s/ Kitty Smith
(By) Deputy Clerk

cc: (all counsel)

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1989-007663	04/07/2003
HON. MARK F. ACETO	CLERK OF THE COURT C. Kelly Deputy
	FILED: 04/08/2003
STATE OF ARIZONA	ATTORNEY GENERAL GERALD R. GRANT
v.	ANDERS V ROSENQUIST JR.
BERTON SIEGEL (A)	APPEALS-PCR-CCC VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

On January 27, 2003, Defendant filed an Amended Petition for Post-Conviction Relief. The Court has reviewed this amended petition along with the associated response and reply.

There has not been a significant change in the law as it relates to Defendant's case.

Further, the arguments Defendant now makes are precluded.

Under the circumstances,

IT IS ORDERED dismissing Defendant's petition for post-conviction relief.

/s/ ECK. MARK F. ACETO
JUDICIAL OFFICER OF THE SUPERIOR COURT

APPENDIX D

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Respondent, v. BERTON SIEGEL, Petitioner.	Court of Appeals Division One No. 1 CA-CR 03-0349 PRPC Maricopa County Superior Court No. CR 1989-007663 ORDER

(Filed Jun. 04, 2004)

Presiding Judge Jon W. Thompson and Judges Susan A. Ehrlich and Jefferson L. Lankford have considered this petition for review from the trial court's denial of post-conviction relief.

IT IS ORDERED denying review.

DATED this 4th day of June 2004.

/s/ Jon W. Thompson
JON W. THOMPSON
PRESIDING JUDGE

1 CA-CR 03-0349 PRPC
Maricopa County Superior Court
CR 1989-007663

A true copy of the foregoing
was mailed June 4, 2004 to:

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/s/ Mary [Illegible]
Deputy Clerk

APPENDIX E

[SEAL]

Supreme Court

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NOEL K. DESSAINT
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October 20, 2004

RE: **STATE OF ARIZONA v. BERTON SIEGEL**
Arizona Supreme Court No. CR-04-0247-PR
Court of Appeals Division One
No. 1 CA-CR 03-0349 PRPC
Maricopa County Superior Court No. CR 1989-007663

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 19, 2004, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Justice Berch, Justice Ryan and Justice Hurwitz participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 20th day of October, 2004.

Noel K. Dessaint, Clerk

TO:
Hon Terry Goddard, Arizona Attorney General
Attn: Randall M. Howe and Pamela Hearn Svoboda
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jr

Supreme Court, U.S.
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No. 06-1240 DEC 26 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BERTON SIEGEL,

Petitioner,

v.

JAMES MCFADDEN, Warden; et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Ninth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Berton Siegel, Petitioner, vs. James McFadden, et al., Respondents.	)	No. CIV 05-988 PHX-JAT (LOA) **REPORT AND RECOMMENDATION**

This matter arises on Petitioner's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (document # 1)[1]. Respondents have filed a Response to the Petition (document # 11) to which Petitioner has not replied.

I. Factual and Procedural Background

On July 1, 1992, Petitioner pleaded guilty in the Arizona Superior Court to three counts of theft in violation of A.R.S. §§ 13-1004 and 1802(A)(12). (document # 1, Exh. O) On July 31, 1992, the trial court[2] imposed three years of probation on each count to be served concurrently. (document # 1, Exh. P) On April 27, 1994, Petitioner's probation was revoked and he was sentenced to 1.5 years imprisonment for a single count[3].

[1] Several months after filing his § 2254 Petition, Petitioner sought to amend his petition to pursue a petition for writ of error coram nobis. In a separate Order, the undersigned denied that motion because the federal district court lacks jurisdiction to entertain a petition for writ of error coram nobis with respect to a state conviction. See, *United States v. Crowell*, 374 F.3d 790, 794 (9th Cir. 2004); *Tavares v. Massachusetts*, 59 F.Supp.2d 152, 154 (D. Mass. 1999).

[2] The Honorable J.D. Howe presided.

[3] The Honorable Judge Pro Tem Rae Chornenky presided.

(document #1, Exh. K) The trial court reinstated Petitioner's probation on the other counts, to date from his original sentencing date. (document # 1, Exh. K)

In his pending petition, Petitioner admits that on December 13, 2000, he filed a Petition for Writ of Habeas Corpus challenging the same state court conviction. This Court dismissed that Petition for lack of jurisdiction because Petitioner was no longer in state custody under his state conviction. See, *Berton Siegel v. Terry Stewart*, 2:00CV2360 PHX-JAT, document # 3 at 2. On April 1, 2005, Petitioner filed the pending Petition for Writ of Habeas Corpus challenging his state court convictions. (document # 1) Petitioner concedes that he was not in state custody when he filed the pending petition. (document # 8)

II. Analysis

A district court may only entertain a Petition for Writ of Habeas Corpus from a "person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254. A federal district court lacks jurisdiction to consider a § 2254 petition unless the petitioner is in custody at the time the petition is filed. See, *Rosendiz v. Kovensky*, 2005 WL 1501495, at * 3 (9th Cir., June 27, 2005). Additionally, "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for purposes of a habeas attack upon it." *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (an expired conviction can never satisfy the 'in custody' requirement, even if it is used to enhance a subsequent sentence.)

Here, Petitioner was not in custody in 2000 when he filed his first Petition for Writ of Habeas Corpus which this Court dismissed for lack of jurisdiction. Petitioner again is not in custody but has filed a second Petition for Writ of Habeas Corpus challenging the same state court conviction and sentence that was the subject of his 2000 action. Petitioner's probation terms and his term of incarceration expired in 1995. Petitioner was not in custody when he filed the pending § 2254 petition. Accordingly, Petitioner cannot maintain a § 2254 petition.

Accordingly,

IT IS HEREBY RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus (document # 1) be **DISMISSED** for lack of jurisdiction.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within which to file a response to the objections. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the

findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See*, Rule 72, Federal Rules of Civil Procedure.

DATED this 15th day of September, 2005.

/s/ Lawrence O. Anderson
Lawrence O. Anderson
United States Magistrate Judge